

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KENNETH BOWSER,)	
)	
Plaintiff,)	Civil Action No. 22-721
)	
v.)	District Judge W. Scott Hardy
)	Magistrate Judge Lisa Pupo Lenihan
M&M LIME COMPANY, INC.,)	
)	
Defendant.)	

MEMORANDUM ORDER

This matter comes before the Court on Defendant’s Objections (Docket No. 19) to the Report and Recommendation (“R&R”) entered by Magistrate Judge Lisa Pupo Lenihan on October 19, 2022 (Docket No. 18). The R&R recommends that the Motion to Dismiss Count II (ADEA) of Plaintiff’s Complaint (Docket No. 12), filed by Defendant M&M Lime Company, Inc., be denied. (Docket No. 18 at 1, 4). Service of the R&R was made on the parties through the Court’s CM/ECF system, and they were advised that any objections to same were due by November 2, 2022. (Docket No. 18). On November 2, 2022, Defendant filed its Objections to the R&R. (Docket No. 19).

Defendant objects to Judge Lenihan’s recommendation that its Motion to Dismiss Plaintiff’s claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (“ADEA”), be denied. Specifically, Defendant argues that, even giving Plaintiff the deference due to him at this stage of the proceedings by allowing him to plead allegations based upon both notice and inference, the inferred language of the Complaint does not support an ADEA claim. (Docket No. 19 at 1). While Defendant concedes that Plaintiff has adequately pled a claim in Count I based on disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

(“ADA”), Defendant argues that Plaintiff has not adequately alleged in Count II that, after being laid off during the pandemic, he was not recalled because of his age, in order to plead a cognizable claim based on age discrimination. (*Id.* at 2).

The Federal Rules of Civil Procedure provide that a party may file specific written objections to the proposed findings and recommendations of a magistrate judge, and a district judge must conduct a *de novo* review of any part of the R&R that has been properly objected to. *See* Fed. R. Civ. P. 72(b)(2), (b)(3); 28 U.S.C. § 636(b)(1). The Court may accept, reject, or modify the recommended disposition, as well as receive further evidence or return the matter to the magistrate judge with instructions. *See id.* Upon careful *de novo* review of the R&R and the entire record, including Defendant’s Motion to Dismiss Count II and supporting briefs, and Plaintiff’s response thereto, (Docket Nos. 12, 13, 16, 17, 18, 19), the Court concludes that, despite Defendant’s arguments to the contrary, Defendant’s Objections do not undermine the R&R’s recommended disposition.

In so ruling, the Court agrees with Judge Lenihan’s conclusion that, in the allegations made in the Complaint, Plaintiff has raised an inference that he was not recalled because of his age when, after temporary layoffs occurred, younger employees were recalled but he and other older employees were not. (Docket No. 18 at 4). Accordingly, the Court also agrees with the conclusion in the R&R that, *at this early stage of the proceedings*, Plaintiff has sufficiently alleged the fourth element of a *prima facie* case of age discrimination under the ADEA. (*Id.* at 3-4 (quoting *Dodson v. Coatesville Hosp. Corp.*, 773 F. App’x 78, 80 (3d Cir. 2019) (listing the elements of a *prima facie* case under the ADEA, including, “(4) the adverse action occurred under circumstances that create an inference that plaintiff’s age was a motivating factor”))).

As such, the Court will adopt the R&R as the Opinion of the Court, and will deny Defendant's Motion to Dismiss Count II (ADEA) of Plaintiff's Complaint, as more specifically set forth below.

Accordingly, in view of the foregoing, the Court enters the following Order:

AND NOW, this 15th day of November, 2022,

IT IS HEREBY ORDERED that Defendant's Objections to the R&R (Docket No. 19) are OVERRULED, and the R&R (Docket No. 18) is ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that, for the reasons set forth in the R&R, Defendant's Motion to Dismiss Count II (ADEA) of Plaintiff's Complaint (Docket No. 12) is DENIED.

IT IS FURTHER ORDERED that Defendant shall file its Answer to Plaintiff's Complaint by **December 6, 2022**.

s/ W. Scott Hardy
W. Scott Hardy
United States District Judge

cc/ecf: All counsel of record